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PERSONAL PRIVACY VERSUS PUBLIC INTERESTS: GOVERNMENT PUBLICATION OF TAX INFORMATION DISCLOSED IN A JUDICIAL PROCEEDING

INTRODUCTION

The individual taxpayer has an interest in protecting the confidentiality of his tax return information¹ because it contains personal and financial data, but such information is routinely and lawfully released in judicial proceedings in which a taxpayer's compliance with the tax laws is at issue.² The subsequent broadcast by the government of such information beyond the judicial context in which it was first adduced raises serious questions of interference with the individual's right to privacy. Social and legal commentators have coined the phrases "informational privacy"³ and "disclosural privacy"⁴ to describe the individual's interest in limiting the dissemination of information describing his personal circumstances, and these terms have aptly been applied to an individual's right to confidentiality in his tax return information.⁵

In the 1970s legislation sought to codify governmental policy on the issue of informational privacy. Congress attempted to restrict the disclosure of personal information through the Privacy Act of 1974 (Privacy Act), but did little to protect the confidentiality of tax returns.⁶ Recognizing the shortcomings of

1. I.R.C. § 6103(b)(2)(A) (1982) defines "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments"

2. I.R.C. § 6103(h)(4) (1982); see *infra* note 54 and accompanying text.

3. Greenawalt, *Final Report to the Office of Telecommunications Policy: Legal Protections of Privacy* 15 (1976) (prepared for the Domestic Council Committee on the Right of Privacy). "[I]nformational privacy involves safeguarding the areas a person controls and guarding against intrusion upon his private activities." *Id.*

4. Committee on the Office of Attorney General, *Privacy: Personal Data and the Law* 6 (Nov. 1976) [hereinafter *Personal Data*]. "Disclosural privacy is a part of the freedom to direct one's own life." *Id.*

5. *Id.*

6. Benedict & Lupert, *Federal Income Tax Returns — The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940, 949 (1979).

the Privacy Act, Congress authorized the formation of the Privacy Protection Study Commission (Privacy Commission) to examine such disclosure problems.⁷ Significantly, Congress recognized in the Tax Reform Act of 1976 (Tax Act) the individual's need for informational privacy by adopting the Privacy Commission's mandate that the Internal Revenue Service (IRS) keep tax return information confidential.⁸ Thus, the Tax Act introduced into the Internal Revenue Code (IRC) limitations on the tax return information which the IRS may disclose to government agencies and to other individuals.

In drafting legislation such as section 6103 of the IRC, Congress attempts to balance informational privacy with governmental interests, and must weigh the individual's interest in the confidentiality of personal information against the need for government and public access and disclosure.⁹ The Privacy Act¹⁰ and the Tax Act¹¹ are attempts to reconcile these conflicting interests, but they do not appear to have delineated the appropriate balance.

*Lampert v. United States*¹² illustrates the conflicts inherent in the present state of the law. The IRC mandates that "[r]eturns and return information shall be confidential,"¹³ but the *Lampert* court held that the inclusion in government press releases of tax information disclosed in a judicial proceeding did not violate the confidentiality provisions of section 6103.¹⁴ Although section 6103 permits the disclosure of tax information in a judicial proceeding,¹⁵ the broadcast by the government of personal information outside the scope of its intended judicial use raises a conflict with the taxpayer's interest in informational privacy.

This Note discusses the competing public and private interests which attach to tax return information, surveys the history of recent legislation which addresses these interests, and examines the implications of recent cases, including *Lampert*, which seek to balance the rights involved. The Note concludes that neither

7. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 1905.

8. I.R.C. § 6103(a) (1982).

9. *Personal Data*, *supra* note 4, at 6.

10. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896.

11. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

12. 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1931 (1989).

13. I.R.C. § 6103(a) (1982).

14. *Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1931 (1989); *see infra* notes 104-23 and accompanying text.

15. I.R.C. § 6103(h)(4) (1982); *see infra* note 54 and accompanying text.

Congress nor the judiciary has successfully resolved the inherent conflict of interests, and it suggests the direction of future legislation and interpretation.

I. CONFLICTING NEEDS: THE INDIVIDUAL'S INTEREST IN THE
CONFIDENTIALITY OF PERSONAL INFORMATION VERSUS THE NEED
FOR GOVERNMENTAL ACCESS AND DISCLOSURE

A. *The Individual's Interest in the Confidentiality of Personal
Information*

Individuals have an interest in keeping the information in their tax returns private because of its personal nature. For example, return information reveals the taxpayer's identity and the nature, sources, and amount of his income.¹⁶ It may also reveal the individual's marital status, dependents, alimony payments, and medical and dental history.¹⁷ The disclosure of contributions to political and charitable organizations¹⁸ may suggest the political and social views of a taxpayer. Similarly, the disclosure of the names of partners, investment and casualty losses, and union dues¹⁹ may expose the taxpayer's business affairs. These revelations of a taxpayer's personal affairs and circumstances are troublesome because the information contained in a tax return is extracted from the taxpayer unwillingly. Furthermore, once he has provided the information required by the IRS for taxing purposes, the taxpayer loses control over the information's further, and perhaps unrelated, dissemination.

Tax information is provided by the taxpayer to the IRS under threat of serious punishment.²⁰ Although the taxpayer might prefer to protect his own privacy interests, the government may bring its police power to bear in securing the information necessary to carry out its revenue function. The Privacy Commission²¹ concluded that since such tax information is disclosed unwillingly, its dissemination, if allowed at all, should be careful and controlled.²²

16. Benedict & Lupert, *supra* note 6, at 943.

17. *Id.*

18. *Id.*

19. *Id.*

20. See I.R.C. § 6651 (1982) (consequences for failing to file); I.R.C. § 7203 (1982) (criminal sanctions for willful failure to file return and pay taxes due).

21. See *infra* notes 43–46 and accompanying text.

22. PRIVACY PROTECTION STUDY COMMISSION, FEDERAL TAX RETURN CONFIDENTIALITY 26 (June 1976) [hereinafter FEDERAL TAX RETURN CONFIDENTIALITY].

A measure of the compulsion under which a taxpayer discloses his personal affairs to the government for internal revenue purposes is the paucity of defenses for nondisclosure. In *Garner v. United States*,²³ for example, the Supreme Court held that information provided by an individual on his tax return is not a "compelled" disclosure, and therefore is not shielded by the fifth amendment's protection against self-incrimination.²⁴ Once information is disclosed on tax returns, the taxpayer cannot claim the privilege.²⁵ The Court stated that an individual may assert his fifth amendment right by refusing to make a disclosure in the return if the information would tend to incriminate him.²⁶ Such a refusal, of course, exposes the taxpayer to prosecution for failure to file a complete return, an action in which his only defense is the assertion of a good faith belief in the incriminating nature of the withheld information.²⁷

Having disclosed to the government the required details of his personal life for the purposes of tax assessment, the taxpayer continues to have an interest in the subsequent distribution and use of the information for numerous purposes unrelated to the administration of the tax laws. The argument has been advanced that a condition on the disclosure of personal information, particularly in the context of a statutorily required tax return, is complete confidentiality. This condition, implicit or explicit, is violated when the information is used for "non-tax purposes"²⁸ or when it is subsequently broadcast further than the provider of the information was able to foresee.²⁹

23. 424 U.S. 648 (1976).

24. *Garner v. United States*, 424 U.S. 648, 665 (1976).

25. *Id.*

26. *Id.*

27. *Id.* at 651, 663 n.18. See also *United States v. Johnson*, 577 F.2d 1304, 1310-11 (5th Cir. 1978). The *Johnson* court noted that there are three general principles which may be gathered from the cases addressing the good faith claim of the fifth amendment privilege against self-incrimination in situations involving a failure to disclose tax return information:

(1) the privilege must be claimed specifically in response to particular questions, not merely in a blanket refusal to furnish any information; (2) the claim is to be reviewed by a judicial officer who determines whether the information sought would tend to incriminate; (3) the witness or defendant himself is not the final arbiter of whether or not the information sought would tend to incriminate.

Johnson, 577 F.2d at 1311. This good faith claim of privilege will not protect the taxpayer in a case where there is a complete failure to file a tax return. *Id.*

28. Benedict & Lupert, *supra* note 6, at 943.

29. Greenawalt, *supra* note 3, at 47.

B. The Need for Governmental Access and the Need for Governmental Confidentiality

Congress has determined that the intrusion into citizens' personal lives represented by the collection of tax information is warranted by a "compelling societal need to finance governmental activities."³⁰ The IRS, in order to implement the provisions of the IRC, collects and stores immense amounts of information provided by taxpayers.³¹

Opposing the government's legitimate needs for the information collected through the tax laws, however, is a pervasive public policy favoring the confidentiality of tax return information.³² An implicit guarantee of confidentiality assures individuals that the information they provide to the government will not be disclosed to their neighbors, and protecting tax returns and other confidential forms advances the government's interest in "full and honest disclosure of needed information."³³ In fact, severely limiting the dissemination of tax information may be an essential element in preserving the nation's voluntary, self-assessment tax system, because, without an assurance of confidentiality, taxpayers may be unwilling to provide the information fundamental to the internal revenue function.³⁴

II. THE PRIVACY ACT OF 1974 AND THE TAX REFORM ACT OF 1976

With the enactment of the Privacy Act of 1974 and the Tax Reform Act of 1976, Congress grappled with defining and achieving an appropriate balance between the individual citizen's interest in the privacy of his affairs and the government's need to acquire and to distribute information to carry out its fundamental functions.

A. The Privacy Act of 1974

The Privacy Act has three main goals: to acknowledge the individual's interest in governmental recordkeeping, to regulate

30. FEDERAL TAX RETURN CONFIDENTIALITY, *supra* note 22, at 25.

31. *Id.*

32. *Id.* at 27. *See, e.g.,* Association of Am. R.Rs. v. United States, 371 F. Supp. 114, 116 (D.D.C. 1974). "The policy of confidentiality for income tax data encourages the full disclosure of income by taxpayers in that the individual or corporate taxpayer is assured that his neighbor or competitor will not be apprised of the intimate details of his financial life." *Id.*

33. *Personal Data*, *supra* note 4, at 26.

34. FEDERAL TAX RETURN CONFIDENTIALITY, *supra* note 22, at 27.

federal agencies' information exchange, and to balance the individual's need for privacy concerning his personal information with the government's need for information for legitimate governmental functions.³⁵ The Privacy Act states that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States"³⁶ and "[t]he purpose of the Act is to provide certain safeguards for an individual against an invasion of personal privacy."³⁷

The Privacy Act recognizes and protects individual interests by restricting the disclosure of personal information in governmental agency records, except for a list of enumerated exceptions,³⁸ and by otherwise prohibiting disclosure without the individual's consent.³⁹ Although tax returns are specifically covered by the Privacy Act, "the Act's broad exceptions negate any practical effect" of ensuring the confidentiality of tax return information.⁴⁰ The largest exception to nondisclosure in the Privacy Act permits the dissemination of personal tax records to other agencies for "routine use" without the individual's consent.⁴¹ The Privacy Act also allows disclosure of confidential information for investigative purposes or other legitimate law enforcement activities and for statistical purposes.⁴²

Even as it enacted the Privacy Act, Congress acknowledged the need for a stronger policy specifically controlling the disclosure of tax return information by creating the Privacy Protection Study Commission⁴³ to report to the President and to Congress on a number of remaining issues, including the confidentiality

35. S. REP. NO. 1183, 93d Cong., 1st Sess. 1, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS, 6916, 6916-17.

36. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 1896.

37. *Id.*

38. 5 U.S.C. § 552a(b) (1988). The Act exempts the release of information without the consent of the individual to whom the information refers, *inter alia*, to officers and employees of the government agency maintaining the record, to the Bureau of the Census, to statistical reporting agencies, to the National Archives, to routine users, to law enforcement agencies, to persons for compelling reasons of health or safety, to either House of Congress, to the Comptroller General, to a consumer reporting agency, or to anyone pursuant to a correct order. *Id.*

39. *Id.*

40. Benedict & Lupert, *supra* note 6, at 949 (citing FEDERAL TAX RETURN CONFIDENTIALITY, *supra* note 22, at 15).

41. 5 U.S.C. § 552a(a)(7) (1988) (defining "routine use" as a use compatible with the purpose for which the information was collected).

42. 5 U.S.C. § 552a(b)(7) (1988).

43. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 1905.

and nontax use of tax information.⁴⁴ Both Congress and the Privacy Commission conducted hearings on these issues and released an interim report in 1976.⁴⁵ The report recognized the inadequacies of both the Privacy Act and the IRC and recommended greater restrictions on the disclosure of confidential tax return information.⁴⁶

B. The Tax Reform Act of 1976

The Tax Reform Act of 1976⁴⁷ (Tax Act) embodied many of the Privacy Commission's recommendations. Most significantly, the Tax Act incorporated into the IRC the basic premise that tax returns and return information "shall be confidential"⁴⁸ and should not be disclosed unless specifically authorized by the IRC.⁴⁹ The statutory emphasis on confidentiality was augmented by regulations allowing disclosure only if information could not be gathered by other means⁵⁰ and by the statutory imposition of civil liability for any unauthorized disclosure of tax information.⁵¹ The adoption of a policy ensuring confidentiality substantially altered the IRS's previous definition of tax returns as general governmental assets,⁵² a change prompted in part by revelations that the Nixon Administration may have conducted income tax audits and investigations in a discriminatory manner unrelated to the legitimate collection of internal revenue.⁵³

A significant exception to section 6103's broad prohibition of the disclosure of tax return information is the IRC's allowance for the revelation of such information in any judicial proceeding pertaining to tax administration:

44. *Id.* at 1906.

45. The Privacy Commission forwarded its interim report, *FEDERAL TAX RETURN CONFIDENTIALITY*, to President Ford and Congress in June 1976.

46. *FEDERAL TAX RETURN CONFIDENTIALITY*, *supra* note 22, at 31–33.

47. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

48. I.R.C. § 6103(a) (1982).

49. *Id.*

50. Treas. Reg. § 301.6103(h)(2)-1(b)(iii) (1989) states:

Disclosure of a return or return information to a person other than the taxpayer to whom such return or return information relates or such taxpayer's legal representative to properly accomplish any purpose or activity described in [the statute] should be made . . . only if such purpose or activity cannot otherwise properly be accomplished without making such disclosure.

Id.

51. I.R.C. § 7431 (1982).

52. Benedict & Lupert, *supra* note 6, at 941.

53. *Id.* at 941–42.

A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only—

- (A) if the taxpayer is party to such proceeding;
- (B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;
- (C) if such return or return information directly relates to a transactional relationship between the person who is party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or
- (D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title...⁵⁴

This "judicial proceeding" exception of section 6103 permits the government to place any details of a taxpayer's personal and financial affairs contained in his tax returns before a court under the conditions enumerated, and the revealed information perforce enters the public record of the tribunal.

III. RECENT CASES ADDRESSING THE DISCLOSURE PROVISIONS OF THE TAX REFORM ACT OF 1976

While the routine disclosure of tax information in the course of a judicial proceeding is clearly lawful under I.R.C. 6103(h)(4), several courts have recently considered whether the subsequent publication by the government of tax return information, first disclosed in court, is a violation of the confidentiality provisions incorporated into the IRC by section 6103. The courts have sought different balances between the interests of the individual and the public, have construed differently the conflicting doctrines codified in the IRC, and consequently have reached different and essentially irreconcilable conclusions.

A. *Cases Favoring the Continuing Confidentiality of Tax Information Under the IRC, Even Though Disclosed in a Judicial Proceeding*

In *Rodgers v. Hyatt*,⁵⁵ the Tenth Circuit Court of Appeals held that an IRS agent's disclosure of tax information that had been

54. I.R.C. § 6103(h)(4) (1982).

55. 697 F.2d 899 (10th Cir. 1983).

the subject of his testimony in a prior court proceeding violated the confidentiality provisions of section 6103(k)(6)⁵⁶ of the IRC, even though the details of the proceeding were a part of the public record. Hyatt, the IRS agent, had subsequently repeated to others his court testimony, based partly on information drawn from Rodgers' tax returns, alleging that Rodgers had dealt in stolen oil, allegations that were not substantiated in court.⁵⁷

The Tenth Circuit narrowly interpreted section 6103(k)(6) in finding that Hyatt, indisputably an Internal Revenue Service employee, had repeated his testimony without trying to elicit further information regarding the alleged oil thefts.⁵⁸ Because the disclosure could not then fall within the specified statutory guidelines, the court held that the disclosure was prohibited by section 6103.⁵⁹

Hyatt rested his defense on a series of cases holding that there can be no expectation of privacy in matters of public record.⁶⁰ The court rejected the defense, however, stating that the issue before it was not whether the release of tax return information from the public record violated the taxpayer's confidentiality, but whether the IRS agent made an "unauthorized disclosure" in violation of the plain meaning of IRC section 6103.⁶¹ Within the Tenth Circuit, therefore, *Rodgers* establishes that the government can violate the disclosure restrictions of the IRC without violating the individual's right to privacy.

In *Johnson v. Sawyer*,⁶² the District Court for the Southern District of Texas similarly construed the confidentiality provisions of section 6103 to authorize disclosure only for reasons enumerated

56. I.R.C. § 6103(k)(6) (1982) provides for:

Disclosure by internal revenue officers and employees for investigative purposes — An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

Id.

57. *Rodgers v. Hyatt*, 697 F.2d 899, 900—01 (10th Cir. 1983).

58. *Id.* at 904—05.

59. *Id.* at 906.

60. *Id.* at 902.

61. *Id.* at 906.

62. 640 F. Supp. 1126 (S.D. Tex. 1986).

in the statutory exceptions. Johnson sued the IRS when it issued two press releases containing information from his tax returns after he pleaded guilty to charges of tax evasion.⁶³ Johnson claimed that the press releases violated IRC section 6103 by unlawfully disclosing information that he had provided to the IRS on his tax return.⁶⁴

Closely analyzing the wording of the IRC, the district court first determined that the information in dispute was "return information."⁶⁵ The court then found that Congress had defined "disclosure" broadly; "disclosure" under the IRC means "the making known to any person in any manner whatever a return or return information."⁶⁶ The press releases, therefore, "disclosed" "return information" unlawfully unless an exception permitted its subsequent publication.⁶⁷

The *Johnson* court insisted on a strict and plain reading of the IRC, rejecting the government's argument that Johnson had no expectation of privacy in matters revealed upon the public record.⁶⁸ The court stated, "Congress made the language of § 6103 quite clear: any disclosure of return information is illegal 'except as authorized by this title.'"⁶⁹ The court buttressed its interpretation of Congress' intent by citing Senate committee reports on the Tax Act which called for the confidential treatment of returns and return information except for those situations which the Tax Act specifically exempted in section 6103 of the IRC.⁷⁰

IRC section 7217, which defined the civil cause of action against government agents who violate the provisions of section 6103, specifically provided that a government employee's "good faith" release of tax return information was a defense to a claim of violation of the confidentiality provisions of the IRC.⁷¹ Applying section 7217 to judge the issue of good faith in the 1981 release of the press notices, the court examined whether the law prohibiting disclosure of tax information had been established with sufficient clarity to support the presumption that the law

63. *Johnson v. Sawyer*, 640 F. Supp. 1126, 1128-29 (S.D. Tex. 1986).

64. *Id.* at 1130.

65. *Id.* at 1130-31.

66. *Id.* at 1131.

67. *Id.*

68. *Id.* at 1132.

69. *Id.* (emphasis in the original).

70. *Id.*

71. I.R.C. § 7217(b) (1976) *repealed by* Pub. L. No. 97-248, Title III, § 357(b)(1), 96 Stat. 646 (1982).

was known to a reasonable public official.⁷² The court found that the straightforward language of section 6103 was clear and concluded that a government employee, acting reasonably, should have known that the disclosure was unlawful under the IRC.⁷³ The court did not rule on the scope of liability under the IRC.⁷⁴ However, it did suggest that since Congress had broadly defined disclosure under the IRC with the underlying purpose of preventing breaches of confidentiality, government agents other than the one directly responsible for the offending disclosure might be held liable in damages for violations of the statute.⁷⁵

The decisions in *Rodgers* and *Johnson* focused closely on the language of section 6103, both determining that any disclosure of tax information not specifically permitted by the IRC was a violation of the confidentiality provisions. The *Rodgers* court held that since the IRC specifically defined the scope of allowed disclosure for IRS officials and employees, any disclosure outside of that definition was unauthorized.⁷⁶ The court based its decision on a clear violation of the statutory language. The court in *Johnson* similarly emphasized the specific language of the IRC, but it also examined the congressional intent behind the language to discern the breadth of the confidentiality provisions. Relying both on the terms of the IRC and on legislative expressions of an interest in preserving the confidences of the individual taxpaying citizen, the *Johnson* court explicitly refused to create an additional exception to the law by judicial decision.⁷⁷ Significantly, the *Rodgers* court clearly found that the taxpayer could claim no expectation of privacy in tax return information which had been lawfully disclosed in a judicial proceeding,⁷⁸ while the *Johnson* court, even though it did not need to reach the issue, noted that the government founded its defense on the same logic.⁷⁹

B. Cases Permitting the Subsequent Rediscovery by the Government of Tax Information Released in a Judicial Proceeding

Given the variety of congressional efforts to define and to balance the confidentiality interests which attach to tax return

72. *Johnson*, 640 F. Supp. at 1133–34.

73. *Id.* at 1134.

74. *Id.* at 1133.

75. *Id.*

76. See *supra* notes 55–61 and accompanying text.

77. See *supra* notes 62–75 and accompanying text.

78. *Rodgers v. Hyatt*, 697 F.2d 899, 902–03 (10th Cir. 1983).

79. *Johnson v. Sawyer*, 640 F. Supp. 1126, 1132 (S.D. Tex. 1986).

information, it is not surprising that the public redisclosure of such information by the government, in the context of judicial proceedings, but outside of the narrow definitional confines of section 6103, has produced sharply differing judicial conclusions. Both *Cooper v. IRS*⁸⁰ and *United States v. Posner*,⁸¹ for example, involved third party requests for tax return information released in a judicial proceeding, as contrasted to the public disclosure of information by an IRS officer or employee involved in the case before the court. The rationales developed in *Cooper* and *Posner*, however, have become pivotal in later cases considering governmental disclosures.

In *Cooper*, the court considered a citizen's request under the Freedom of Information Act (FOIA) for IRS documents used in a United States Tax Court proceeding.⁸² Prior to the district court action, the documents had been available for public inspection for over a year during the pendency of the Tax Court action.⁸³ At the close of trial, the Tax Court returned the documents to the IRS for routine refiling.⁸⁴ Before the district court, the IRS sought to block the delivery of the documents to the party making the FOIA request by claiming that the papers were protected by FOIA's exclusion of documents "specifically exempted from disclosure by statute."⁸⁵ The IRS contended that the IRC's confidentiality provisions applied as specific statutory exemptions which prevented the disclosure of returns and return information.⁸⁶

The *Cooper* court held that records returned to the IRS after their release to the Tax Court, even though they contained tax return information identifiable with individuals, could not regain their confidential status.⁸⁷ The court's decision emphasized the importance not only of the release of the records to the court for routine proceedings, but also the availability of the records to the public for the preceding year.⁸⁸ The court stated that by

80. 450 F. Supp. 752 (D.D.C. 1977).

81. 594 F. Supp. 930 (S.D. Fla. 1984).

82. *Cooper v. United States*, 450 F. Supp. 752, 752 (D.D.C. 1977). "The documents requested consist primarily of copies of various estate and corporate tax returns, deeds, lien notes, releases from indebtedness, and other communications and agreements relevant to the assessment of estate taxes in each of the Tax Court cases." *Id.* at n.1.

83. *Id.* at 753.

84. *Id.*

85. *Id.* at 752. The IRS pointed out that 5 U.S.C. § 552(b)(3) permits the government to refuse to disclose under FOIA any documents whose confidentiality is defined by another statute. *Id.*

86. *Id.*

87. *Id.* at 755.

88. *Id.* at 753-54.

releasing the information, the IRS chose not to keep the documents confidential, and, therefore, could not claim any interest in preventing the further disclosure of the papers.⁸⁹

In considering the public policies underlying FOIA, the *Cooper* court found that although section 552(b) of FOIA contains certain limited exemptions, the objective of FOIA is disclosure and not secrecy.⁹⁰ The court concluded that when informational documents are released for public inspection, even as part of court proceedings, they become part of the public record and are freely available under FOIA.⁹¹

In *Posner*, a newspaper sought, and was allowed access to, Posner's tax return which had been admitted into evidence in a codefendant's trial for tax violations.⁹² Posner requested a protective order to prevent the release of tax return information which had not been revealed in the trial proceedings, even though the entirety of the return had been admitted into evidence.⁹³ Posner argued that the public policy of ensuring the confidentiality of his tax information favored the protection of his returns against public disclosure or, alternatively, that disclosure to the media would violate his personal right to privacy.⁹⁴

The District Court for the Southern District of Florida found that since the returns had been admitted into evidence in a public judicial proceeding, they were a part of the public record and had, therefore, lost their confidential status.⁹⁵ The court held that both the public and the press had a first amendment right of access to Posner's evidentiary tax return, and refused to hinder the disclosure of the return in its entirety.⁹⁶

In contrast to *Posner* and *Cooper*, both of which involved third party requests for tax information which had been admitted into court as evidence, *Thomas v. United States*⁹⁷ involved the republication by the government of a Tax Court decision and the parties' stipulations at trial. In *Thomas*, the taxpayer brought suit against the United States because the IRS issued a press

89. *Id.*

90. *Id.* at 755.

91. *Id.*

92. *United States v. Posner*, 594 F. Supp. 930, 931–32 (S.D. Fla. 1984).

93. *Id.* at 931.

94. *Id.* at 931–32.

95. *Id.* at 936.

96. *Id.* at 937.

97. 671 F. Supp. 15 (E.D. Wis. 1987).

release summarizing his Tax Court proceedings and against a newspaper which reprinted the information verbatim.⁹⁸ The court's decision was clear and forceful; Thomas' claim was found to be without merit, and he was assessed attorneys' fees.⁹⁹ In determining damages for the frivolous claim, the court considered that the taxpayer had initiated the proceedings which inevitably resulted in the disclosure of his tax return information.¹⁰⁰ Explicitly adopting the rationale of *Posner*, the court held that the decision of the Tax Court was a public document in which Thomas had no legitimate privacy interest and that there could be no liability for the subsequent publication of public facts.¹⁰¹

The *Thomas* court did not consider the rules of either *Rodgers* or *Johnson*, both of which had relied on the specific language of the IRC to bar the disclosure of tax information by government officials, even though, as in *Thomas*, the same information had been revealed on the record of a prior judicial proceeding.¹⁰² Instead, the court went directly to the fact that the plaintiff had initiated the suit, thereby disclosing his own tax returns to public view.¹⁰³ It is unclear from the decision whether the *Thomas* court found that a plaintiff who initiates suit against the IRS thereby waives all rights to confidentiality under the IRC, or whether the court simply found Thomas' case to be so frivolous that it justified a harsh decision.

*Lampert v. United States*¹⁰⁴ presented the Ninth Circuit Court of Appeals with facts similar to those of *Rodgers* and *Johnson*, but the court refused to find that a government official's press releases containing tax information disclosed in a judicial proceeding violated the confidentiality provisions of IRC section 6103. Extending the rationales of *Posner*, *Cooper*, and *Thomas*, the court reasoned that once information is released in a judicial proceeding, it becomes a part of the public record, and the taxpayer loses any right or expectation of privacy in that information.¹⁰⁵

The Ninth Circuit case was a consolidation on appeal of the District Court for the Northern District of California's decisions

98. *Thomas v. United States*, 671 F. Supp. 15, 16 (E.D. Wis. 1987).

99. *Id.* at 16–17.

100. *Id.* at 16.

101. *Id.*

102. See *supra* notes 55–79 and accompanying text.

103. *Thomas*, 671 F. Supp. at 16.

104. 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1931 (1989).

105. *Lampert v. United States*, 854 F.2d at 337–38.

in *Lampert v. United States*,¹⁰⁶ *Figur v. United States*,¹⁰⁷ and *Peinado v. United States*.¹⁰⁸ The appeals court summarized the similar facts of the consolidated cases,¹⁰⁹ and noted that the lower courts had awarded summary judgment to the government in all of them.¹¹⁰

Reviewing the provisions of IRC section 6103,¹¹¹ the Ninth Circuit panel found without dispute that the information released by the government in each case was "return information,"¹¹² that the original release of the information in judicial proceedings occurred lawfully pursuant to IRC section 6103(h)(4)(A),¹¹³ and that the government had subsequently republished the same information.¹¹⁴ The court then drew the issue plainly:

The government argues that once such information is lawfully disclosed in judicial proceedings, it loses its confidentiality and is no longer subject to the restrictions of section 6103. Taxpayers argue, however, that section 6103(h)(4)(A) on its face applies only to disclosures *in* judicial proceedings.... The taxpayers therefore contend that while the contested information could lawfully be disclosed in court, the act forecloses further dissemination of even "public record" return information.¹¹⁵

Recognizing that the identical issue had been presented to previous courts, the appeals court succinctly reviewed the decisions in *Rodgers*¹¹⁶ and *Johnson*,¹¹⁷ both of which directly

106. 87-1 U.S. Tax Cas. (CCH) ¶ 9361 (N.D. Cal. Apr. 8, 1987). The United States Attorney and the IRS issued separate statements to the press describing the investigation of Lampert for the sale of abusive tax shelters in the context of their filing for a permanent injunction against such sales. *Id.*

107. 662 F. Supp. 515 (N.D. Cal. 1987). The United States Attorney charged Figur with income tax evasion. The same day, the U.S. Attorney issued a press release summarizing the charges contained in the filing and relating Figur's guilty plea. *Id.* at 516.

108. 669 F. Supp. 953 (N.D. Cal. 1987). The United States Attorney issued two press releases, one stating that Peinado had pled guilty to two counts of income tax evasion and the other announcing Peinado's subsequent sentencing. *Id.* at 953.

109. *Lampert v. United States*, 854 F.2d 335, 336 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1931 (1989). See *supra* notes 106-08.

110. *Lampert*, 854 F.2d at 336.

111. See *supra* notes 47-54 and accompanying text.

112. *Lampert*, 854 F.2d at 336.

113. *Id.* at 337.

114. *Id.* at 337 n.1.

115. *Id.* at 337 (citations and footnote omitted).

116. *Rodgers v. Hyatt*, 697 F.2d 899 (10th Cir. 1983); see *supra* notes 55-61 and accompanying text.

117. *Johnson v. Sawyer*, 640 F. Supp. 1126 (S.D. Tex. 1986); see *supra* notes 62-75 and accompanying text.

supported the position of the taxpayer, and the findings in *Thomas*,¹¹⁸ *Posner*,¹¹⁹ and *Cooper*,¹²⁰ in which the view of the government prevailed. The court, pointing to the plaintiffs' admission that anyone may obtain information from the public record, narrowed the question before it to whether a government employee is prohibited from disclosing return information in the absence of an applicable exception to section 6103(a).¹²¹

To answer the question which it had posed, the Ninth Circuit panel resorted to a close semantic analysis of the IRC. The court stated that:

Only a strict, technical reading of the statute supports the taxpayers' position. While generally our duty is to give effect to the literal language of a statute, we are not obligated to do so when reliance on that language would defeat the purposes of the statute. We believe that Congress sought to prohibit only the disclosure of confidential tax return information. Once tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information.¹²²

Having so defined the issues, the court had no difficulty holding that "once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by [government] press release does not violate the [Tax] Act."¹²³

IV. CONCLUSION

The *Lampert* decision is no more successful than its predecessors in providing a definitive interpretation of section 6103. The Ninth Circuit Court of Appeals¹²⁴ and the District Courts of Northern California,¹²⁵ of Eastern Wisconsin,¹²⁶ of

118. *Thomas v. United States*, 671 F. Supp. 15 (E.D. Wis. 1987); see *supra* notes 97–103 and accompanying text.

119. *United States v. Posner*, 594 F. Supp. 930 (S.D. Fla. 1984); see *supra* notes 92–96 and accompanying text.

120. *Cooper v. IRS*, 450 F. Supp. 752 (D.D.C. 1977); see *supra* notes 82–91 and accompanying text.

121. *Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1931 (1989).

122. *Id.* (citations omitted).

123. *Id.*

124. *Id.* at 335.

125. *Lampert v. United States*, 87-1 U.S. Tax Cas. (CCH) ¶ 9361 (N.D. Cal. Apr. 8, 1987); *Figur v. United States*, 662 F. Supp. 515 (N.D. Cal. 1987); *Peinado v. United States*, 669 F. Supp. 953 (N.D. Cal. 1987).

126. *Thomas v. United States*, 671 F. Supp. 15 (E.D. Wis. 1987).

Southern Florida,¹²⁷ and of the District of Columbia¹²⁸ have concluded that tax return information lawfully released in a judicial proceeding, by virtue of its appearance on the public record, loses the protection of the confidentiality provisions of the IRC. The Tenth Circuit Court of Appeals¹²⁹ and the Southern District of Texas,¹³⁰ on the other hand, have found that the government's republication of return information released in court is an unauthorized disclosure because it is not explicitly sanctioned by any provision of the IRC, which otherwise broadly mandates that the government observe confidentiality.

The polar difference between the two lines of cases appears to hinge on the concepts of *disclosure* and of *confidentiality*. Cases holding for the government seem to equate disclosure with the initial lifting of confidentiality surrounding tax return information. So long as the first revelation is lawful, as is the case for information disclosed pursuant to IRC in a judicial proceeding, any further dissemination is not a prohibited disclosure for the purposes of the law because the revealed information is no longer confidential.¹³¹ Cases finding for the taxpayer, however, seemingly read disclosure much more broadly, minimizing the constructive disclosure inherent in the concept of the public record and defining disclosure under the IRC to mean revelation to any wider audience than that to which the information was actually revealed for the purpose of the proceeding.

This semantic disagreement suggests judicial confusion regarding the intent of Congress in balancing the competing interests in the confidentiality provisions of section 6103, and the recurrence of the controversy indicates that some definitive resolution is overdue. A possibility for such a resolution is consideration by the United States Supreme Court of the evident split between the Ninth Circuit's result in *Lampert*¹³² and the

127. *United States v. Posner*, 594 F. Supp. 930 (S.D. Fla. 1984).

128. *Cooper v. I.R.S.*, 450 F. Supp. 752 (D.D.C. 1977).

129. *Rodgers v. Hyatt*, 697 F.2d 899 (10th Cir. 1983).

130. *Johnson v. Sawyer*, 640 F. Supp. 1126 (S.D. Tex. 1986).

131. *See, e.g., Lampert v. United States*, 854 F.2d 335, 338 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1931 (1989). "We agree when once information is lawfully disclosed in court proceedings, § 6103(a)'s directive to keep return information confidential is *moot*." (citations omitted, emphasis added). *Id.*

132. *Lampert v. United States*, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1931 (1989); *see supra* notes 104–23 and accompanying text.

Tenth Circuit's interpretation in *Rodgers*.¹³³ The Court, however, denied certiorari to the taxpayer in *Lampert*.¹³⁴

Alternatively, Congress could clarify its intent on the complex balance with comparatively simple additions to the IRC. The precise balance to be sought by Congress appears from the cases not to be that between the public and private interests involved, however, but rather between two competing public interests. On the one hand, the public must have access to government documents in order to ensure the accuracy of personal records, and to ensure that government agencies remain accountable for their policies and practices. On the other hand, the government guarantees the confidentiality of tax return information to protect the personal privacy of taxpayers, and to preserve the integrity and the successful functioning of the voluntary tax system. *Lampert*, and other cases permitting government agencies' public disclosure of tax information released in a judicial proceeding, may hamper the latter of these two interests. By allowing government officials, most notably IRS employees, to publicize any civil tax litigation, taxpayers may be disinclined to consider litigation requiring the release of their tax returns. The *Lampert* decision sanctions the possibility for abuse of tax return information by government employees who may threaten to broadcast personal information released in court proceedings.

These conflicts suggest that the best congressional course may be to extend IRC section 6103's protection of return information released in a judicial proceeding. Although information revealed in court becomes part of the public record, stricter guidelines could be enacted to prevent the release of tax information which is not part of the trial proceeding, and to limit governmental use of information released in court. The Tax Act of 1976 guaranteed tax return confidentiality following the revelation of governmental misuse of tax information. To prevent the possibility of governmental abuse in the judicial context, new restrictions must support the guarantee of protection for the individual's privacy interests, thereby maintaining the integrity of the voluntary tax system.

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133. *Rodgers v. Hyatt*, 697 F.2d 899 (10th Cir. 1983); see *supra* notes 55-61 and accompanying text.

134. *Lampert v. United States*, 109 S. Ct. 1931 (1989).